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No. 04-873

IN THE

Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY POLICE DEPARTMENT,

Petitioner,

v.

EDWARD R. WILLIAMS AND ANGELYNNE WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Third Circuit properly held that respondent Edward Williams' claims that petitioner violated the ADA by failing to accommodate both his actual and perceived disability were sufficient to survive summary judgment.

2. Whether the Third Circuit correctly decided that there was a genuine issue of fact as to whether Williams' impairment restricted his ability to perform a class of jobs.

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INTRODUCTION

The petitioner asks this Court to grant certiorari in this case principally to resolve the question whether, under the Americans with Disabilities Act (ADA), an employer must reasonably accommodate an employee who is not actually disabled but is perceived by the employer to be disabled. That question, however, is not necessary to the decision of this case in its current interlocutory posture, because the court of appeals found the respondent had shown there was a material issue of fact over whether the respondent unlawfully had discriminated against him by failing to accommodate an *actual* disability as well as a perceived disability. Further proceedings on remand may well result in a final judgment in respondent's favor on the actual disability claim, or, conceivably, judgment against him on both the actual and perceived disability claims. In either event, it would prove unnecessary to decide the question petitioner advances in order to resolve this case.

Moreover, although petitioner asserts that there is a conflict among the circuits over the question whether the ADA entitles an employee with a perceived disability to be accommodated by his employer, none of the cases petitioner cites addresses the issue presented here: whether an employer violates the ADA by failing to accommodate an employee with an actual disability because the employer wrongly *perceives* the disability to be more severe than it is. None of the policy reasons (incorrect in our view) other courts have advanced for disregarding the language of the ADA and holding that a person with only a perceived disability is not entitled to accommodation applies in the unusual factual circumstances of this case.

Finally, petitioner's second question presented — whether respondent's inability to work in law enforcement positions constituted a substantial limitation on a major life activity — is a factbound question that has not been resolved definitively in this case, and the court of appeals' discussion

of the legal principles relevant to the determination of that issue does not conflict with any appellate decision cited by petitioner. For these reasons, which will be explained more fully below, the petition for certiorari should be denied.

STATEMENT

A. The ADA

The relevant provisions of the ADA are clear. The law forbids employment discrimination "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "disability" under the statute is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2). A "qualified individual with a disability" is an "individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8) (emphasis added).

Thus, if a person (i) has a disability and (ii) can perform the essential functions of employment with a reasonable accommodation, it is illegal to discharge him because of the disability. To make the point explicit, the law states that to "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless such accommodation would be an "undue hardship." *Id.* § 12112(b)(5)(A).

B. The Facts

Many of the facts of this case are disputed, and the disputes have not yet been resolved by a finder of fact. The opinion of the Third Circuit sets forth at length both the undisputed facts and the evidence that, viewed in the light most favorable to the respondent as non-movant, creates genuine issues of material fact as to whether the petitioner discrimi-

nated against him on the basis of both actual and perceived disability. We therefore summarize the facts only briefly here.

Respondent Edward Williams was a 24-year veteran police officer employed by petitioner Philadelphia Housing Authority (PHA) Police Department. Beginning in May 1998, following a confrontation with a superior officer, Williams was suspended from active duty. He was diagnosed as suffering from major depression and applied for a series of medical leaves.

By the fall of 1998, a PHA psychologist had concurred that Williams suffered from depression and should not be permitted to carry a weapon. The PHA's psychologist had, however, opined that Williams was capable of working in the department in some capacity and could work around other armed officers.

Following his evaluation by the PHA psychologist, Williams requested first that he be given an assignment in the training department, and then that he be assigned to the radio room. The PHA denied his first request, and instead of acceding to the second offered him only the choice of applying for additional unpaid medical leave or being terminated. When Williams did not apply for additional medical leave, the PHA fired him on December 29, 1998.

C. The Decision Below

Williams sued the PHA under the ADA and the Pennsylvania Humans Relations Act in the United States District Court for the Eastern District of Pennsylvania, alleging (among other things) that the PHA had violated the ADA by discriminating against him on account of disability when it fired him rather than reasonably accommodating his disability, and by retaliating against him for exercising his rights under the ADA (by requesting accommodation). Williams argued he was disabled within the meaning of the ADA both

because he actually was disabled and because he was regarded as disabled by the PHA.

The district court granted summary judgment on the ADA claims, holding that the retaliation claim failed because Williams had not presented evidence sufficient to create an issue of fact as to retaliatory motive, and that the discrimination claim was insufficient because, as a matter of law, Williams was not disabled. Williams appealed. The Third Circuit affirmed the grant of summary judgment against Williams on the retaliation claim, but reversed on the claim of discrimination.

With respect to the discrimination claim, the court held that Williams had presented sufficient evidence to create an issue of fact as to discrimination based on both actual and perceived disability. As to actual disability, the court found that Williams' evidence indicated he had a mental impairment, to wit, depression, which left him unable to carry a gun. The court of appeals held that a jury could find this inability precluded him from serving in most law enforcement jobs, and that this preclusion from a "class of jobs" substantially limited him in the major life activity of working.[1] The court further held that a jury could find on Williams' evidence that the nature and severity of his impairment and its duration or expected duration sufficed to qualify it as a disability under the ADA.

As for whether the PHA regarded Williams as disabled, the court held it was "clear" that although the PHA's own

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[1] Citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and the relevant EEOC regulation, 29 C.F.R. § 1630.2(j)(3)(i), the Third Circuit noted that exclusion from either a "class of jobs" or a "broad range of jobs" renders a person substantially limited in the major life activity of working. The court agreed with the district court that Williams had not shown exclusion from a "broad range of jobs," but held that there was a fact issue whether the limitations on his ability to perform law enforcement jobs excluded him from a "class of jobs."

psychologist had found Williams could work around officers carrying firearms, the PHA "perceived Williams as being unable to have *access* to firearms and to be *around others* carrying firearms." 380 F.3d at 766. Because the court had already decided there was an issue of fact as to whether Williams' *actual* impairment (depression making him unable to carry a firearm) restricted his ability to perform a class of law enforcement jobs, and because "[t]he additional limitations perceived by PHA, of course, only serve to further restrict the jobs Williams could perform in law enforcement," the court held that there was also an issue of fact as to whether the PHA regarded Williams as substantially limited in the major life activity of working. *Id.* at 767.

Having determined there was an issue of fact as to both actual and perceived disability, the court turned to whether Williams was a "qualified" person with a disability — that is, whether, "with or without reasonable accommodation," he could "perform the essential functions of the employment position." 42 U.S.C. § 12111(8). With respect to Williams' actual disability claim, the court held there was an issue of fact as to whether the PHA could have reasonably accommodated him with a temporary transfer to the radio room, because "[a] reasonable jury could ... conclude that Williams's actual limitations left him qualified to do radio room work." 380 F.3d at 769.

As for the alternative claim that Williams was "regarded as" disabled, the court again held the availability of a radio room transfer demonstrated the PHA could have accommodated Williams. The court acknowledged the PHA's argument that its misperception that Williams could not operate around officers carrying weapons led it to believe he was unqualified for a radio room transfer. But the court rejected the view that an employer could bootstrap its own misperception into a basis for denying an accommodation: "[i]f an employer believes that a perceived disability inherently precludes successful performance of the essential functions of a job, with

or without accommodation, the employer must be correct about the affected employee's ability to perform the job in order to avoid liability." *Id.* at 770 (quoting *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 193 (3d Cir. 1999)).

Having determined Williams was "qualified" under either the actual disability or perceived disability theory because he could perform essential job functions with a reasonable accommodation, the court found there was an issue of fact over whether the PHA had discriminated against him, either by denying him the reasonable accommodation he had requested or by failing to engage in good faith in the "interactive process" necessary to determine if Williams was disabled and, if so, could be accommodated. 380 F.3d at 771-72.

Because one of the possible grounds on which Williams might prevail on remand was failure to accommodate a perceived disability, the court went on to address whether or not employees "regarded as" disabled are entitled to accommodation under the ADA. The court stated that "[w]hile we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results,' we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text." 380 F.3d at 774. The court observed that the clear language of the ADA defined persons with disabilities to include persons "regarded as" disabled by their employers, and that the text made no distinction between actual and perceived disability with respect to the statutory ban on "not making reasonable accommodation to the ... mental limitations of an otherwise qualified individual." *Id.* (quoting 42 U.S.C. § 12112(b)(5)(A)).

The court further noted that the legislative history of the ADA stressed the importance of protecting persons regarded as disabled just as much as those who actually are disabled. In support, it cited *School Board of Nassau County v. Arline*, 480 U.S. 272 (1987), where this Court long ago declared that,

under the parallel Rehabilitation Act, persons regarded as having an impairment must be reasonably accommodated by employers.

Finally, the court explained that, assuming Williams proved his case on remand, holding he was entitled to an accommodation for his perceived disability would in no sense provide him with a "windfall" (*id.* at 775-76):

> The record in this case demonstrates that, absent PHA's erroneous perception that Williams could not be around firearms because of his mental impairment, a radio room assignment would have been made available to him and others similarly situated. PHA refused to provide that assignment solely based upon its erroneous perception that Williams's mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns — perceptions specifically contradicted by PHA's own psychologist. While a similarly situated employee who was not perceived to have this additional limitation would have been allowed a radio room assignment, Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from, as confirmed by the Supreme Court's decision in *Arline* and the legislative history of the ADA. Accordingly, Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation.

REASONS FOR DENYING THE WRIT

I. RESOLUTION OF THIS CASE DOES NOT REQUIRE DECISION OF THE PRINCIPAL ISSUE POSED BY THE PETITION, PARTICULARLY GIVEN ITS INTERLOCUTORY POSTURE.

Although it is not evident from reading the petition for certiorari, the question whether a plaintiff "regarded as" disabled is entitled to a reasonable accommodation was not dispositive of Williams' appeal and therefore need not be decided at this time. The Third Circuit held that there were genuine disputes of material fact as to both Williams' claim of discrimination on the basis of *actual* disability and his claim that PHA discriminated against him because it regarded him as being more disabled than he actually was. Even if the issue of accommodation for persons "regarded as" disabled were decided in the manner the PHA proposes, Williams would be entitled to precisely the same relief granted by the court below: Reversal of the district court's grant of summary judgment and remand for further proceedings because of the district court's error in not recognizing the genuine factual dispute as to actual disability.

Moreover, the Third Circuit held that Williams had stated a claim of discrimination (for either actual or perceived disability) based not only on failure to accommodate him, but also, and separately, on the PHA's failure to engage in good faith in the "interactive process" required under the ADA to determine whether an individual is subject to a disability and, if so, entitled to accommodation. *See* 380 F.3d at 772. Notably, petitioner does not dispute that persons who are "regarded as" disabled are entitled to have their employer engage in the interactive process in good faith. Pet. 14-15. Thus, regardless of the accommodation issue, Williams was entitled to a reversal of the summary judgment against him on this ground as well.

The remand proceedings yet to come may result in any number of possible dispositions of this case: Judgment for Williams on the actual disability claim; judgment for Williams on both actual and perceived disability claims (since, in his case, the two are not inconsistent); judgment for Williams on the perceived disability claim only; or judgment for the PHA on both claims. Favorable judgments for Williams may ultimately be based on either the accommodation claim, the interactive process claim, or both. Under several of the possible outcomes, the issue whether a person "regarded as" disabled is entitled to accommodation would be completely irrelevant to the final resolution of the case. Moreover, the remedies to which Williams may ultimately be entitled may be the same regardless of which theories (actual or perceived disability, failure to accommodate or failure to engage in the interactive process) are successful.

In addition, even assuming that the ultimate resolution of the case were to depend in whole or in part on the question of accommodation for perceived disability, a definitive resolution of that question would benefit from a complete factual record as well as actual findings with respect to the nature of Williams' actual and perceived disabilities. Thus, even if the Court were inclined to believe the question of accommodation of perceived disability merited its review, it should await a case where the question was presented on appeal from a final judgment.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). The Court ordinarily limits review of cases in an interlocutory posture to extraordinary circumstances, such as when it is necessary to prevent great inconvenience in the conduct of further proceedings. Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (citing cases). Here, where the Third Circuit has ruled only that there are sufficient issues of

fact to survive summary judgment on both actual and perceived disability, there is no immediate need for review. Indeed, stepping in now only will delay resolution of a case in which the actual disability issue will remain to be litigated in any event.

II. THE CLAIMED CONFLICT AMONG THE CIRCUITS DOES NOT ADDRESS THE PARTICULAR FACTS OF THIS CASE.

In asserting there is a conflict among the circuits over the issue of accommodation for persons "regarded as" disabled, the PHA cites cases from other circuits addressing circumstances in which a person who is *not disabled* claims that he was entitled to accommodation because his employer regarded him to be so. *See Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999); and *Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998).[2] Those decisions rested in large measure on the courts' policy view that application of the ADA's plain language in this context would lead to the "bizarre" result that "impaired employees would be better off under the statute if their employers treated them as disabled even if they were not," and that "it would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability." *Kaplan*, 323 F.3d at 1232.

Regardless of whether these courts are correct in concluding the statute can be rewritten judicially to exclude accom-

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[2] In *Kaplan*, there was no claim of actual disability but only a perceived disability based on a misdiagnosis of the plaintiff's condition. *See* 323 F.3d at 1231. In *Weber*, the court of appeals held that there was no issue of fact as to actual disability. *See* 186 F.3d at 914. And in *Newberry*, the plaintiff relied "only on a perception of disability." 161 F.3d at 279. The PHA also cites *Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999), but acknowledges that the discussion of the accommodation issue in that case was dictum.

modation of persons who are not actually disabled but are so regarded by their employers, this case does not present that issue. Williams' fundamental claim is *not* that he was not actually disabled but was wrongly regarded as such by his employer, but that he *was* actually disabled but was denied the accommodation he sought from the PHA because the PHA wrongly regarded him as being *more* disabled than he actually was. In other words, Williams — unlike the plaintiffs in the cases cited by PHA — would have been entitled to an accommodation even if the PHA correctly perceived his abilities, because a correct perception would have been that he was disabled, but not so disabled as to render him incapable of being accommodated. Thus, Williams in no sense seeks a "windfall," and the considerations that have led other courts to deny the right to accommodation to persons not actually disabled but only regarded as such do not apply to him. Indeed, in this case the windfall would be to excuse the PHA from accommodating Williams because it wrongly perceived him to be more disabled than he was.

Thus, in ruling for Williams, the Third Circuit was not required to, and did not, reject outright the "possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results.'" 380 F.3d at 774. Rather, it held only that on the facts of this case, "a literal reading of the Act will not produce such results," and accordingly it held that it would "remain faithful to [the Act's] directive *in this case.*" *Id.* (emphasis added). The PHA cites no cases addressing similar facts and holding that a person who is actually disabled, but also wrongly regarded as being even more disabled, is not entitled to reasonable accommodation. Thus, the conflict the PHA cites is not presented on the specific facts of this case.

Indeed, the one case the PHA cites that includes some discussion of this issue, *Cigan v. Chippewa Falls School District*, 388 F.3d 331 (7th Cir. 2004), itself recognizes there

may be a distinction between cases where the misperception is about whether a disability exists or not, and cases where the misperception is about the *extent* of an actual disability. Thus, the court observed:

> Being regarded as disabled is a form of disability under the statute and thus could in principle trigger a duty to accommodate, but *what* must be accommodated: any condition that the employer (wrongly) supposes to exist, or only those disabilities that actually afflict the employee? ... The extent to which employers' errors in appreciating the extent of their workers' *real disabilities* create obligations to accommodate can be left for another day ....

Id. at 335-36 (second emphasis added).

In the absence of conflicting decisions addressing the precise issue of an employer's obligation to accommodate an employee who is actually disabled but wrongly perceived to be even more disabled, this Court, too, can leave the issue for another day.

III. THE DECISION OF THE THIRD CIRCUIT IS CORRECT.

The Third Circuit's reading of the ADA as requiring reasonable accommodation of employees who are "regarded as" disabled is substantively correct. Even courts that have refused to require reasonable accommodation for employees "regarded as" but not actually disabled have acknowledged that the plain statutory language carves out no such exception:

> On the face of the ADA, failure to provide reasonable accommodation to "an otherwise qualified individual with a disability" constitutes discrimination. 42 U.S.C. § 12112(b)(5)(A). And, on its face, the ADA's definition of "qualified individual with a disability" does not differentiate between the three alternative prongs of the

> "disability" definition. 42 U.S.C. §§ 12102(2), 12111(8).

Kaplan, 323 F.3d at 1230.

To be sure, *Kaplan* goes on to assert that "[t]he absence of a stated distinction, however, is not tantamount to an explicit instruction by Congress that 'regarded as' individuals are entitled to reasonable accommodations." *Id.* But the Ninth Circuit's assertion that the statute encompasses no "explicit instruction" that "regarded as" individuals are entitled to accommodation is untenable. The statute clearly instructs that failure to accommodate a qualified individual with a disability is discrimination, and it equally clearly outlaws discrimination against a qualified individual with a disability. 42 U.S.C. §§ 12112(a), 12112(b)(5). It defines disability to include being regarded as disabled, and it says that a person who has a disability (whether actual or "regarded as") and who can perform the essential functions of employment *with or without accommodation* is a qualified individual with a disability. 42 U.S.C. §§ 12102(2), 12111(8). As the Third Circuit observed below, "all would agree" that the plain language of the ADA does not permit the distinction the PHA wishes the Court to draw. 380 F.3d at 774.

Since none of the cases denying accommodation to employees perceived as but not actually disabled cites language in the statute to support such an interpretation, the PHA relies on a single law review article to support a convoluted reading of the statute as ambiguous. Pet. at 10-11. The PHA's proposition is summed up in its assertion that "[a]n employer who fails to accommodate a non-disabling impairment does not discriminate 'because of the disability' because the non-disabling impairment is not the basis of the individual's protected status." Pet. at 11. This statement, if comprehensible at all, is obviously incorrect. In the case of a perceived disability, the "basis of the individual's protected status" is that he is "regarded as disabled" by the employer, and when the employer discriminates against him by failing to accommodate

that perceived disability, the employer is discriminating based on the very perception of disability that is precisely "the basis of the individual's protected status."

Petitioner further purports to find support in the "legislative intent" but points to nothing in the legislative history remotely suggesting Congress did not mean what it said when it required accommodation of qualified individuals with disabilities, regardless of whether those disabilities were actual or perceived.

Nor does petitioner come to grips with the fact that this Court, construing the analogous Rehabilitation Act, already has held that under that Act, a person who is perceived as disabled is just as entitled to full protection against discrimination, including reasonable accommodation, as a person who actually is disabled. *School Board of Nassau County v. Arline*, 480 U.S. at 279, 284-85, 289. The PHA's only attempt to deal with *Arline* is a footnote stating that, according to a law review article, *Arline* did not address perceived disability — an assertion a cursory review of the opinion clearly refutes. *See id.* at 284-85.

Finally, the PHA, echoing the Ninth and Eighth Circuits, asserts that accommodating an employee who is "regarded as" but not actually disabled would grant him an undeserved "windfall" by giving him protection he or she would not receive if the employer correctly had regarded him or her as not disabled. We already have explained that this theory, even if correct, does not apply to *this case* because Williams claims that he was both actually disabled and "regarded as" even more disabled than he actually was. In any event, the "windfall" contention is selective, to say the least, as a basis for singling out accommodation as a protection that should be denied to persons "regarded as" disabled under the ADA, even while other protections continue to be provided.

Providing *any* protection to a non-disabled person who is regarded by his employee as disabled obviously gives that person something he would not have if the employer cor-

rectly perceived him as non-disabled. For example, assume that an employer incorrectly regards someone who has a mild skin disorder as disabled. The employee is in fact capable of performing his essential job function *without accommodation*, but the employer nonetheless fires him because he perceives him as disabled. No one would argue that the statute permits such discrimination. At the same time, however, absent the employer's misperception, it could freely have terminated the employee with no concern about possible liability under the ADA. Thus, if the "windfall" concern about accommodation were valid, it would be equally applicable to overt discrimination against "regarded as" employees who do not require accommodation. In short, the "windfall" theory proves too much because the purported "windfall" is only that the "regarded as" employee receives the same protection as an employee who actually is disabled — exactly what Congress plainly intended in enacting the ADA. *See* 380 F.3d at 774.

Moreover, much of the concern about possible "windfalls" stems from speculation about whether an employer will have to *continue* to accommodate an employee even after the employer has been "disabused" of its misperception and no longer regards the employee as disabled. *See Weber*, 186 F.3d at 907 (citing *Deane v. Pocono Med. Center*, 142 F.3d 138, 148-489 n.12 (3d Cir. 1998)). Whether or not an employer must *continue* to accommodate an employee it *no longer* regards as disabled never has been at issue in any of the cases, and certainly is not at issue here.[3] Were the question ripe for adjudication, the plain language of the ADA an-

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[3] Whether it would be an appropriate remedy to force an employer, on an ongoing basis, to accommodate an employee it now knows is not disabled is a very different question from whether the employer should be held liable in the first instance for terminating rather than accommodating an employee it believed to be disabled. *See Workman v. Frito-Lay, Inc.*, 165 F.3d at 468 (remanding for a determination of how to accommodate plaintiff's "evolving" condition).

swers it in the negative, because the employee by definition would cease to be disabled upon the employer's being divested of its misperception. The more pertinent question is whether it is lawful for an employer to terminate an employee it continues to regard as disabled rather than offer him a reasonable accommodation. Holding that failure to accommodate a perceived disability is unlawful in such circumstances no more grants the employee a "windfall" than does providing that an employer may not discriminatorily terminate an employee whom it regards as disabled but who does not require an accommodation. As the Third Circuit correctly recognized, in both cases, the statute achieves its basic purpose of providing protection against irrational prejudice against persons who are viewed as disabled. *See* 380 F.3d at 774.

This Court emphasized the importance of such protections in *Arline*, where it stressed the need to accommodate individuals who have impairments that do not substantially limit their abilities but are perceived as doing so: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative actions of others to the impairment." 480 U.S. at 273. Extending full statutory protection to those who "are regarded as impaired and who, as a result, are substantially limited in a major life activity" ensures that employees "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others," and recognizes "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 274. Congress expressly acknowledged these statements in *Arline* when, in adopting the ADA, it extended full protection to persons "regarded as" disabled. *See* H.R. Rep. No. 101-485(III), 1990 U.S.C.C.A.N. 445, 453.

IV. THE "CLASS OF JOBS" ISSUE IS FACTBOUND AND DOES NOT MERIT RESOLUTION BY THIS COURT.

Almost as an afterthought, the PHA also requests that this Court grant certiorari to consider whether the Third Circuit correctly has held there is an issue of fact as to whether Williams' disability (and perceived disability) substantially restricted him in his ability to perform a "class of jobs" — namely, jobs in law enforcement. The Third Circuit, of course, did not hold that Williams had proven his case on this point: It merely held that the PHA had not demonstrated that there was no issue of material fact as to the extent of the jobs from which Williams was foreclosed and whether it was broad enough to constitute a "class of jobs." Whether the Third Circuit was correct in holding that there was enough of a dispute to foreclose summary judgment against Williams is the classic example of a factbound question of no broad significance.

Attempting to conjure up some broader legal issue meriting this Court's attention, the PHA contends the Third Circuit's holding that the field of law enforcement may constitute a class of jobs is inconsistent with this Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). There the Court held that inability to perform the specific job of "global airline pilot" did not limit an employee in the "major life activity of working" because a number of closely related jobs in the same general field remained available. *Id.* at 493. The Third Circuit did not ignore or disregard the Court's ruling in *Sutton*; rather, it acknowledged *Sutton*'s holding but distinguished the case because there was evidence that Williams, unlike the plaintiffs in *Sutton*, was broadly barred from "most law enforcement positions so long as his condition persisted." 380 F.3d at 765. Whether the Third Circuit was correct in finding that this case is potentially distinguishable from *Sutton* on the facts (depending, of course, on what facts are ultimately shown) is hardly an issue warranting review.

See S. Ct. R. 10 (a petition is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

The PHA also maintains that the Third Circuit's holding conflicts with the Eleventh Circuit's holding in *Rossbach v. City of Miami*, 371 F.3d 1354 (11th Cir. 2004). But the facts in *Rossbach* were patently different from those in this case. There, the plaintiffs were not precluded from all or even most law enforcement jobs; in fact, they were working as light or limited duty police officers. Their impairments barred them only from one specific job: that of a "combat-ready police officer." *Id.* at 1359. Like the Third Circuit in this case, the Eleventh Circuit held that the legal standard for determining whether the plaintiffs were substantially limited with respect to the major life activity of working was whether they were foreclosed from either a "class of jobs" or a "broad range of jobs." *Id.* at 1360. The Eleventh Circuit found that preclusion from only one job (combat-ready police officer) did not satisfy that standard. *Id.* That holding is fully consistent with the Third Circuit's holding in this case that inability to perform all or most jobs in law enforcement constitutes an impairment with respect to a "class of jobs" and, thus, is a substantial limitation on the major life activity of working.

In short, *Rossbach* does not suggest a conflict among the circuits on an important legal question. It only illustrates that application of the same legal standard to different facts yields different results.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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